91-1479

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IN THE

Supreme Court of the United States

October Term, 1991

In the Matter of the Claim of SHIRLEY KLEIN,

Petitioner,

against

THOMAS F. HARTNETT, as Commissioner of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

GILBERT L. OFFENHARTZ
Appellate Counsel and
Counsel of Record for Petitioner
884 West End Avenue
New York, N.Y. 10025
(212) 666-9770

Questions Presented

1. Is Subsection (c) of Section 563 (2) of the Labor Law of New York, in it effect and intent, repugnant to the Establishment Clause of the First Amendment of the United States Constitution (and thus violative of the Due Process Clause of the Fourteenth Amendment) by exempting non profit schools affiliated with a religious institution from providing unemployment insurance coverage for teachers employed by them when all other schools, including non profit athiest schools are specifically required to provide unemployment insurance coverage to teachers?

2. Was respondent, a teacher of English, denied equal protection of the laws when despite a Statute of the United States (P.L. 94-566 of 1976) mandating that elementary and high school teachers thenceforth be provided unemployment insurance coverage, she was denied such coverage because the school in which she taught was found to be affiliated with a religious institution?

List of Parties

The parties involved in the case before this court are as follows:

Claimant-Appellant in the New York Court of Appeals and Petitioner herein:	Shirley Klein
Respondent in the New York Court of Appeals and Respondent herein:	Thomas F. Hartnett, as Commissioner of Labor of the State of New York.
Employer. Appeared at the original administrative hearings only. Did not appear in nor submit a brief to the Unemployment Insurance Appeal Board, nor to the Appellate Division, (first "court of record" in case) nor to the Court of Appeals of New York, the highest court of the state.	Beth Jacob High School (found to have been operated by Congregation Bais Yaakov)
Prior employer. Did not appear in original hearing nor in any proceedings although duly notified.	Ali Ezer Yeshiva

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IN THE

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In the Matter of the Claim of SHIRLEY KLEIN,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

———— • ————

Petitioner, SHIRLEY KLEIN, respectfully prays that a Writ of Certiorari issue to review Order of the New York Court of Appeals dated December 23, 1991 and the Opinion upon which it was based.

Opinions Below

The opinion of the New York Court of Appeals is reported as *Matter of Klein (Hartnett)* at ___ NY2d ___, ___ NYS2d ___ (1991) and is reprinted in the Appendix B to this Petition at pages 1b-13b.

The opinion of the Appellate Division, Third Department of the New York Supreme Court is reported as *Matter of Klein (Hartnett)* at 164 AD2d 9, 563 NYS2d 132, and is reprinted in the Appendix C to this Petition at pages 1c-4c.

The decision and opinion of the Unemployment Insurance Appeal Board is reprinted in the Appendix to this Petition at pages 1d-3d.

The determination and opinion of the Administrative Law Judge is reprinted in the Appendix to this Petition at pages 1e-3e.

Jurisdiction

The order and remittitur of the New York Court of Appeals and the opinion upon which it was based affirming the order of the Appellate Division, Third Department was issued on December 23, 1991.

Said order and opinion specifically rejected petitioner's claims that Section 563 (2)(c) of the Labor Law of New York, in its effect and intent, is repugnant to the Establishment clause of the First Amendment of the United States Constitution. The New York Court of Appeals further specifically rejected Petitioner's claims that she was unconstitutionally denied equal protection of the laws pursuant to the Fourteenth Amendment of the United States Constitution.

This Court has certiorari jurisdiction under 28 U.S.C. §1257(a).

Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State ... shall ...deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 563 (2)(c) of the Labor Law of New York provides in pertinent part:

> "(2) Exclusions. ... [covered] "employment" does not include services rendered for a non profit organization by
>
> * * * * * * * *
>
> (c) a person employed at a place of religious worship as a caretaker or for the performence of duties of a religious nature, or both ... ."

Statement of the Case

No more concise statement of the case or facts can be given or made than the following excerpt from the opinion of the New York Court of Appeals:

> "... Shirley Klein was employed in 1986 as an English teacher at Beth Jacob High School in Brooklyn, N.Y.,

which was operated by Congregation Bais Yaakov, a religious organization. She taught English literature from a curriculum provided by the school, the textbooks for which were monitored so as to exclude any secular material "damaging to the faith." Klien's employment with Beth Jacob was terminated before the end of the 1987 school year. She filed for and received unemployment insurance benefits, but upon her former employer's objection, a local office of the Unemployment Insurance Division of the Department of Labor determined that she was ineligible for unemployment insurance benefits because she had insufficient weeks of insured employment inasmuch as her previous employment at Beth Jacob was by a religious organization, exempt under Labor Law § 562 (2) from making contributions to the unemployment insurance fund on her behalf. She had received $4,140 in benefits which she was required to repay. Klein requested and was given a hearing before an Aministrative Law Judge (ALJ) at which she argued, in part, that the employer exemption violated the Establishment and Equal Protection Clauses of the Federal Constitution. The ALJ sustained the determination of the local office, and in turn was affirmed by the Unemployment Insurance Appeal Board. The ALJ and the Appeal Board ruled that Klein was ineligible for unemployment insurance benefits because her position as a teacher at the Beth Jacob High School constituted employment excluded frrom coverage under Labor Law § 563 (2); however, neither reached the constitutuinal issues raised by Klein. The Appellate Division affirmed the ruling of the Board and, addressng the constitutional issues, concluded that Labor Law § 563 (2)(c) violates neither the Establishment Clause nor the Equal Protection Clause of the United States Constitution. (In the Matter of the Claim of Shirley Klein v Commissioner of Labor [Hartnett] 164 AD2d 9)". *Appendix B, Matter of Klein [Hartnett]* __NY2d__;

As stated by the Court of Appeals in the first paragraph of its opinion, *Appendix B*, *Matter of Klein [Hartnett] supra*, the questions raised on the appeal to it were "whether [the] statutory provision [§ 563 (2)(c)] violates the Establishment Clause of the First Amendment of the United States Constitution, or establishes an impermissible classification in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution." That court decided that the challanged provision was not repugnant to the United States Constitution.

The primary argument of the Petitioner is that the statutory scheme which exempts private non profit religious schools from the responsibility of providing unemployment insurance protection to teachers when private athiest and secular non profit schools are required to provide such coverage is repugnant to the Establishment Clause of the United States Constitution. The Equal Protection argument must spring as a result of the primary argument.

History of Statute in Question

Prior to the enactment of §563.2(c) which replaced §563.2(e) teachers generally were not covered by unemployment insurance. It was an occupation which was thought either not to merit it or not to need it. (It can be speculated that this attitude was because most teachers were women. Teachers in colleges and universities -who were for the most part men- were eligible for unemployment coverage. It should be remembered too, that domestics were also excluded.) Regarding those were <u>not</u> granted coverage, the Federal statute which, prior to 1976 exempted them, provided also that covered employment did not include services performed:

(1) In the employ of (A) a church or convention or association of churches, or (B) any organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches.

(2) by a duly ordained, commissioned, or licensed minister of a church in the excercise of his ministry or by a member of a religious order in the excercise of duties required by such order.

(3) in the employ of a school which is not an institution of higher education.

(26 U.S.C.§3309(b)(1970) of the Federal Unemployment Tax Act (hereinafter:"FUTA:))

Prior to 1977 New York State Labor Law §563.2 contained parallel exemptions, and read in part (as applicable) as follows:

2. Exclusions. ...[covered] "employment" does not include services rendered to a non-profit organization by

(a) (exactly as in §3309(b)(2) above)

(b) (not applicable)

(c) a person employed at a place of religious worship as a caretaker or for the performence of duties of a religious nature, or both;

(d) (not applicable)

(e) a person engaged in a teaching or other professional capacity at an educational institution which is not an

institution of higher education.

In 1976 Congress amended §3309 of FUTA, (P.L.94-566) to eliminate the subsection (3) exemption thereby granting to all teachers, not just those employed in "institutions of higher education" the benefits of unemployment insurance coverage. In 1977, in response to a directive fron the U.S. Department of Labor to all states seeking certification from FUTA, New York repealed the exemption in former §563.2(e) which paralleled FUTA subsection (3) of §3309(b). (N.Y.L. 1977, c.675, §10). The purpose of the repeal, according to the New York State Department of Labor was to conform "state to federal law [to] assure that New York State employers will continue to receive full federal tax credits." (*Letter, State of New York Department of Labor, July 21,1977*).

The U.S. Senate Report on the repeal of Subsection (3) of §3309(b) stated:

> "The committee on Finance, to which was referred [this] bill to require (emphasis added) States to extend unemployment compensation coverage to certain previously uncovered workers ... recommends that the bill as amended do pass." (*S.Rep.No.1265, 94th Cong. 1st Sess. 1, reprinted in U.S. Code Cong. & Ad. News 5977.*)

The question was left open, however, whether Congress intended also to revoke or modify any of the religious based exemptions which existed in FUTA prior to the amendments.

In *St. Martin's Evangelical Lutheran Church and Northwestern Lutheran Academy vs. State of South Dakota*, 451 U.S. 772, 68 L.Ed2d 612, 101 S.Ct. 2142 the United States Supreme Court held that Congress did not manifest a clear intent to specifically include religious school teachers

within the federal or state unemployment insurance schemes. By so doing the Court was able to avoid deciding whether if Congress had indeed enacted a law which mandated that religious schools as well as secular schools provide unemployment insurance to teachers, such a mandate would be violative of the Establishment clause of the First amendment, as urged by the appellants in the *St. Martin* case. Neither was the court called upon in the *St. Martin* case to decide if the exemptions contained for religious schools in 26 U.S.C. §3309 (b)(1)(B) or §3309 (b)(2) violated the Establishment clause. The constitutional issues left open in *St. Martins* were raised but not decided in *California vs. Grace Bretherin Church*, 457 U.S. 393 (1982), in a decision by the Supreme Court based exclusively on its finding that California's taxing statute, as applied, violated the Federal Tax Injunction Act. (See Brooklyn Barrister, Vol 41, No.1, p.33. "Unemployment Insurance and the Establishment of Religion", David Agatstein).

Thus the question of what Congress intended, of whether or not it wished to retain, modify or enlarge the meaning of the religious based exemptions which had been part of the statutory structure prior to the 1976 amendment is not before this court. The question of whether Congress clearly intended to include religious school teachers in the unemployment insurance scheme has, Appellant concedes, *de facto* been settled without the necessity, so far, of a ruling on the constitutionality of its intent.

Neither is the question before this Court of whether the New York State legislature intended to clearly and specifically include teachers in schools affiliated with religious institutions in the unemployment insurance scheme when it repealed the denial of coverage to teachers in general. Indeed, the Appellate Division, Third Department, the department which handles all Unemployment Insurance

cases has already ruled in *Matter of Hollis Hills Jewish Center*, 92 A.D.2d 1039, that the New York State legislature has not manifested such a clear intent. The *Hollis Hills* case did not reach any constitutional questions.

Those aspects of the case being laid to rest, the ultimate question remains: Is Section 563.2(c), as it is interpreted and applied, repugnant to and violative of the Establishment Clause of the First Amendment to the United States Constitution and the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

Reasons for Granting the Writ

This case involves far more than the unconstitutional depravation of of property from a single individual, although that aspect is certainly present.

The issues in this case, whether considered together or separately, are far reaching, fundamental and most importantly, as presented in the instant case, are clear cut.

They are of great public importance.

Further, when one considers the history of the statute and the great amount of litigation with respect to the policies espoused therein it becomes evident that they are of serious and pervading public concern.

The precise issues here presented have not previously been ruled upon by this Court, although some of the underlying if not controlling precedents have been developed over the years, (see *Lemon vs. Kurtzman*, 403 US 602) and indeed may be modified, if not by the Court's decision in this case then perhaps by its decision in another.*

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*_Weisman v. Lee_, No.90-1014 (U.S. argued Nov. 6 1991 [60 USLW 3351, 11/12/91]) where it was argued that the three-part separation rubric set forth in _Lemon_, particularly "undue entanglement," should be re-examined.

Although petitioner grounds her primary arguments on *Lemon, supra*; *Texas Monthly vs. Bullock*, 489 US 1; and *Edwards vs. Aguilard*, 476 US 1103, in petitioner's view a reversal such as petitioner seeks in the instant case would not, in all probability, be precluded by such modifications to *Lemon* as were urged in *Weisman vs. Lee (sub judice)* (see footnote p.10).

It is respectfully submitted that the instant case might be a suitable vehicle for the court to use if it desires to re-examine *Lemon*, particularly the "undue entanglements" test enunciated there.

Reasons for Reversing the Decision Below

Due Process Clause

Any law made or enforced by a State which, if made by Congress or enforced by the United States would violate the Establishment Clause of the First Amendment to the United States Constitution, necessarily violates the Fourteenth Amendment to the Constitution.

That the First Amendment is applicable to the States as well as the United States through the Fourteenth Amendment is so well established that to force this court to read lengthy argument on the subject would be inconsiderate. See *School District of Abington Township Pennsylvania vs. Schemp*, 374 U.S. 203, 10 L.Ed 2d 844, 83 S.Ct. 1563.

Establishment Clause

Section 563.2(c) of the Labor Law of New York in its favoring of non-profit religious schools over non-profit secular or athiest schools does so in violation of the Establishment Clause of the First Amendment.

On its face Section 563.2(c) of the New York State Labor Law raises the spectre that it appears to be in violation of the Establishment Clause of the First Amendment.

While the statute cannot be said to advance one religion over another, on its face it specifically advances religious schools over non-religious, secular or athiest schools, schools which teach "creationism" over schools which teach "Darwinism" or evolution, by exempting non-profit religious schools from the responsibility of providing unemployment insurance coverage for teachers employed by them while mandating that all other non-profit (as well as those run for a profit) schools do so.

There can be no serious doubt that it is a violation of the Establishment Clause of the First Amendment to make or or enforce a law which tends to favor one religion over another or which tends to favor religion over non-religion, or to favor belief in God over non-belief. See *Welsh vs. U.S.*, 308 U.S. 333 (1970); *Murray vs. Curlett*, 374 U.S. 203.

In the case of *Texas Monthly vs. Bullock* 489 U.S. 1, 103 L.Ed.2d 1, 109 S.Ct. 890 the United States Supreme Court held that the Constitution did not permit Texas to exempt religious publications from a state sales tax that was applied to all other publications on the ground that such exemption was a violation of the United States Constitution. That is the law of the land. With all due respect to the New York Court of Appeals, I urge that it committed grevious error in its interpretation of the holding of that case. I fail to see a

significant difference between that case and the one at bar. One can speculate on what different criteria might be used in determining what was a religious duty and what is a religious publication, but one cannot argue with the holding of the Supreme Court that when a tax is broad based than it is unconstitutional to grant an exemption from such tax based upon religious grounds. Petitioner also urges that the Court of Appeals inappropriately extended the meaning and extent of *Walz v. Tax Commission* 397 U.S. 664

Although it has been held since 1970 that certain traditional exemptions from payment of general real property taxes on church property used for religious purposes can be viewed as fostering a states policy of neutrality within the meaning of the Establishment Clause, the Supreme Court in making such holding clearly enunciated that the primary reason for finding that such an exemption might be viewed as an excercise of neutrality was its concern for the burden on Free Exercise that a non-tax-exemption policy would cause. (*cf. Walz v. Tax Commission, supra*). But the Court in that case also warned against the government becoming unduly entangled in church-state relationships.

The subjects of [1]undue entanglement and [2]the intent and [3]the effect of statutes were discussed and elucidated by the Supreme Court in the case of *Lemon vs. Kurtzman* 403 U.S. 602, 29 L.Ed 2d 745, 91 S.Ct. 2105 (1971) which became the guiding precedent for subsequent cases.

The Supreme Court succinctly summarized the three criteria mandated by *Lemon* in the case of *Committee for Public Education and Religious Liberty vs. Nyquest*, 413 US 756, 30 L.Ed2d 948, 93 S.Ct. 2955 in the following words:

> "...to pass muster under the Establishment Clause the law in question first, must reflect a clearly legislative purpose, ...second, must have a primary effect that

> neither advances nor inhibits religion,...and, third, must avoid excessive entanglement with religion.

It is respectfully submitted that there can be no credible argument that the primary intent of §563.2(c), which embodies nothing other than a religious exemption, is other than to advance or benefit private non-profit parochial schools while denying such benefit to private non-profit secular or athiest schools *Mueller vs Allen*,463 US 388,77 L.Ed 2d 721, 103 S.Ct. 3062 (1983). The entire unemployment insurance scheme as embodied in FUTA and in the Labor Law of New York would remain in effect and operate smoothly and fairly if §563.2(c) were declared unconstitutional, as it should be,

It is further respectfully submitted that no credible argument can be made that the primary effect of the statute is the not the same as its intent: advancing private non-profit religious schools while at the same time denying such benefits to private non-profit secular or athiest schools.

The argument *in vacuuo* that the section was enacted merely to provide benefits for certain workers but not to others, neither of whom received them prior to the enactment of the statute is to purposely avoid the underlying question. What is the real reason for exempting the operators of non-profit religious schools from providing unemployment benefits for teachers when the operators of secular and athiest non-profit schools are required to provide such benefits? (It should be noted that petitioner here is not questioning nor challanging such other parts of the statute which exempts operators of private non-profit religious schools from providing unemployment benefits from members of religious orders and the like; such exemptions are handled by a different section (§563(2)(b).)

The argument that the primary purpose of subsection (c)

of §563(2) is to avoid state entanglement with religion cannot stand empirically, nor even be credibly supported theoretically.

Historically the religious exceptions in FUTA §3309(b) was enacted long before the "undue entanglement" proscriptions were enunciated by the Supreme Court in *Walz, supra*, in 1970 and elucidated in *Lemon, supra*, in 1971. Thus any argument that religious exemption provisions were enacted with the intention of enabling the government to avoid "undue entanglement" would appear to be inapposite.

I respectfully submit that those religious exemptions in FUTA which underlie §563(2)(c) as well as §563(2)(c) itself were enacted purely and simply to reflect the political realities of the time, which was to do what was possible to aid religious establishments. But as Justice O'Conner said in her concurring opinion in *Lynch vs. Donnelly* 465 US at 692, 104 S.Ct.at 1369:

> "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion."

In *Edwards vs. Aguillard* 476 U.S. 1103 the Supreme Court made abundantly clear that it was the function and duty of courts to look at more than the mere drafted words of a statute, or its preamble or the legislators public appologias when attemptiing to ascertain its true intent.

The question to be answered when testing the constitutionality of a statute under the *Lemon, supra* "secular purpose" test is not whether there is or could be any secular purpose but rather whether the actual predominant purpose is to endorse religion. *Weisman vs. Lee* 908 f.2d 1090, See *Wallace vs. Jaffree* 472 US 38 105 S.Ct 2479, 86 L.Ed2d 29 (1985).

Lastly, with respect the argument proposed by respondent

below that the primary effect of the challanged section is permit the State to avoid "undue entanglement" with religion: no facts or statistics whatsoever has ever submitted to support such argument which is based solely on speculation. Upon analysis however, even this argument will be seen to be less than compelling.

This argument must rely on the assumption that future claims would be made (and have to be adjudicated) by persons claiming unemployment benefits by virtue of their rights under the Free Exercise Clause after either quitting or losing their jobs or having been denied employment by a religious school institution because they would have to perform duties or work under conditions which were antithical to their religious beliefs, and that the government would be compelled to constantally entangle itself in matters of religion to administer such potential aspect of the unemployment insurance benefit scheme.

In answer to this it may be asserted that such cases are adjudicated every day and it does not become necessary for the government to embroil itself in theological matters or unduly entangle itself in "matters of religion". The factual inquiries authorized and required by the Free Excercise cases merely go to deciding whether the beliefs held by the claimant are "religious" rather than "secular" and whether they are sincere. Indeed, in cases where an employee is alleged to have performed "religious duties" for an ecclesiastical institution (as in the instant case) the factual approach, were §563.2(c) declared to be unconstitutional, would be virtually identical to a "sincerity inquiry". (It might be speculated that an employee's religious repugnance to perform a duty or work under certain conditions might, in the latter example, where §563.2(c) no longer existed, be considered a lack of ability and qualification for the job which should have been disclosed upon application, thereby

creating cause for his being fired and precluding him from using his religious beliefs as an excuse for quitting.)*

Neither is it to be feared that the government would repeatedly be compelled to decide whether or not the duties performed by a discharged employee were of a religious or secular nature. All, at least all teachers, should be afforded the benefits of unemployment insurance compensation. Priests, rabbis, nuns, ministers (and teachers) are all taxed on their income according to our broadly based income tax scheme. There is nothing wrong with this. There is something wrong with exempting only religious institutions from a broad based tax which everybody else in the same situation except for his lack or religiosity must pay. *Texas Monthly vs. Bullock, supra.*

Further it should be noted that not only do employees of religious institutions have their personal income taxed but that their religious employers are required to withhold such tax from their pay and to keep and file records accordingly.

There is no opportunity to hurt or help religious institutions more than secular institutions in such a universal requirement as there might possibly be when assessing real estate values or attempting to set differential tax assessments.(*compare Walz vs Tax Commissioner, supra*). Likewise there is no opportunity to advance or inhibit religious schools as opposed to non-religious or secular schools by requiring both to be subject to the same broad

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Corporation of Presiding Bishop vs. Amos, 483 US 327 dealt with the question of whether religious organizations were prohibited from religious discrimination in hiring by the Civil Rights Act (42 USC § 2000-e). NOte should be taken of Justice O'Conner's words in that case: that there is a difference between the Government "advancing religion and permitting a religious organization to do so." In the instant case it is respectfully urged it is the Government itself which is indeed advancing religion by its application of §563(2)(c).

based unemployment insurance responsibilities as are virtually all other employers in both the public sector and the private sector, including business organizations as well as secular non-profit employers.

Were the statute nulified the governments entanglement with religion necessitated by its responsibility to adjudicate Establishment Clause questions raised in Unemployment Insurance cases would be obviated and the seriousness of its entanglement caused by Free Exercise questions raised in Unemployment Insurance cases would be minimized if not obviated in cases respecting religious institutions.

Equal Protection Clause

Section 563.2(c) of the New York State Labor Law is violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution

Section 563.2(c) of the Labor Law of New York in its favoring of non-profit religious schools over non-profit secular or athiest schools does so in in derogation of the rights of a generally described class of citizens, (all teachers), who but for the religious nature of the school by which they are employed would be accorded those rights accorded to all other members of the class to which they belong and be protected by the general laws of the state; thus Section 563.2(c) is violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Appellant concedes that unemployment insurance coverage is not a fundamental right to which all citizens or persons living, working or having worked in the United States are entitled.

Indeed, there are very few rights which are so fundamental. But appellant contends that one of those rights is that if a law is enacted granting certain rights, privileges or benefits to an entire class of persons, (in the instant case: teachers) which benefits must be provided to such a class by another general class of persons (in this case: schools/employers) and one is a member of the beneficiary class, then the state cannot lawfully deny one such rights, privileges or benefits by granting an exemption to a subclass from the responsibility of providing such benefits merely because the subclass is connected to a religious institution when in the ordnary course of events that particular type of subclass, were it not connected with a religious institution would be responsible to provide such benefits.

In the instant case it is respectfully urged that the exempting of non-profit religious schools from the responsiblity of complying with a general law enacted to generally and broadly provide benefits to an entire population, and to remedy the fact that the so called "woman's occupations" historically were denied benefits, is indeed a violation of appellants rights to equal protection of the law. She is a member of a class which were afforded benefits by virtue of a general law.

Appellant would not urge this argument if teachers in all schools, or even if teachers employed by all non-profit schools were excluded from benefits. But she does argue that to carve an exemption for religious schools only,* is to

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*Subsection (c) of § 563 (2) of the Labor Law of New York excludes from unemployment insurance coverage "persons performing duties of a religious nature at a place of worship". Under the interpretations of this statute made by the courts of New York, all teaching activity if it performed in a place of religious worship or under the auspices of a religious institution must be construed as being religious in nature. *Matter of Hollis Hills Jewish Center*, 92 AD2d 1039.

denegrate her rights, which were created by the statute which mandated that thenceforth elementary and high school teachers would be covered by unemployment insurance like almost everyone else, *Mueller vs Allen, supra.* She urges that the state has neither a compelling nor a rational reason for carving out such an exception and that therefore by so doing it has denied her equal protection of the laws.

CONCLUSION

Section 563(2)(c) of the Labor Law of New York in is repugnant to the Establishment Clause of the First Amendment of the United States Constitution. The State, in denying appellant's claim for unemployment benefits pursuant to § 563.2(c) denied appellant due process of law and denied her equal protection of the laws in violation of the 14th Amendment. A writ of certiorari should issue to review the decision of the New York Court of Appeals.

Respectfully submitted

GILBERT L. OFFENHARTZ
Appellate Counsel and
Counsel of Record for Petitioner
884 West End Avenue
New York, N.Y. 10025
(212) 666-9770

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APPENDIX A
Remittitur of Court of Appeals

Remittitur

COURT OF APPEALS
STATE OF NEW YORK
The Hon. Sol Wachtler, Chief Judge, Presiding

3 No. 259
In the Matter of Shirley Klein,
Appellant,
Thomas F. Hartnett, as
Commissioner of Labor,
Respondent.

The appellant in the above entitled appeal appeared by Gilbert L. Offenhartz, Esq.;

the respondent appeared by Hon. Robert Abrams, Attorney General of the State of New York.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Judge Alexander. Chief Judge Wachtler and Judges Simons, Kaye, Titone, Hancock and Bellacosa concur.

The Court further orders that this record of the proceedings in this Court be remitted to the Appellate

Division, Third Department, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/ *Donald M. Sheraw*
Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany,
December 23, 1991.

APPENDIX B
Opinion of N.Y. Court of Appeals (uncorrected)

STATE OF NEW YORK
COURT OF APPEALS

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3 No. 259
In the Matter of Shirley Klein,
Appellant,
Thomas F. Hartnett, as Opinion
Commissioner of Labor,
Respondent.

Gilbert L. Offenhartz, for Appellant
Jan Lauer Barker for respondent

ALEXANDER, J.:
Labor Law §563 excludes from unemployment insurance coverage, among others, persons performing duties of a religious nature at a place of worship (Labor Law § 563[2][c]). The question on this appeal is whether this statutory provision violates the Establishment Clause of the First Amendment of the

[2]

United States Constitution, or establishes an impermissible classification in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution We conclude that it does not.

Shirley Klein was employed in 1986 as an English teacher at Beth Jacob High School in Brooklyn, which was operated by Congregation Bais Yaakov, a religious

organization.[1] She taught English literature from a curriculum provided by the school, the textbooks for which were monitored so as to exclude any secular material "damaging to the faith." Klein's employment with Beth Jacob was terminated before the end of the 1987 school year. She filed for and received unemployment insurance benefits, but upon her former employer's objection, a local office of the Unemployment Insurance Division of the Department of Labor determined that she was ineligible for unemployment insurance benefits because she had insufficient weeks of insured employment inasmuch as her previous employment at Beth Jacob was by a religious organization, exempt under Labor Law § 563(2) from making contributions to the unemployment insurance fund on her behalf. She had received $4,140 in benefits which she was required to repay. Klein requested and was given a hearing before an Administrative Law Judge (ALJ) at which she argued, in part, that the employer exemption violated the Establishment and Equal Protection Clauses of the Federal Constitution. The ALJ sustained the determination of the local office, and in turn was

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affirmed by the Unemployment Insurance Appeal Board. The ALJ and the Appeal Board ruled that Klein was ineligible for unemployment insurance benefits because her position as a teacher at the Beth Jacob High School constituted employment excluded from coverage under Labor Law § 563(2); however, neither reached the constitutional issues raised by Klein. The Appellate Division affirmed the ruling of the Board and, addressing the constitutional issues, concluded that Labor Law § 563(2)(c) violates neither the

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[1]The students at Beth Jacob High School were Orthodox Jewish girls and all the teachers were required to be Jewish women.

Establishment Clause nor the Equal Protection Clause of the United States Constitution (In the Matter of the Claim of Shirley Klein v Commissioner of Labor [Hartnett,___ AD2d___). For the reasons set forth below, we now affirm the Appellate Division.

Appellant does not dispute that her position as a teacher at the Beth Jacob High School constituted non-covered employment under Labor Law § 563(2)(c) (see, St. Martin Evangelical Lutheran Church v South Dakota, 451 US 772, 783-784; Matter of Marasco [Hartnett], 145 AD2d 862, 863; Matter of Hollis Hills Jewish Center [Roberts], 92 AD2d 1039; see also, Matter of Rochester Christian Church v State of New York Public Serv. Commn., 55 NY2d 196, 203-204). She contends, however, that because the statute serves no secular legislative purpose, has the purpose and effect of favoring religious schools over nonreligious schools, and results in undue and excessive

[4]

entanglement of government with religion, it violates the Establishment Clause of the First Amendment. She argues further that because the statute favors non-profit religious schools over non-profit secular or athiest schools, it unlawfully discriminates against and denoes equal protection to teachers at non-profit religious schools. These arguments are without merit.

We begin our analysis by observing the oft- quoted axiom that the constitutionality of a statute is presumes, and while this presumption is rebuttable, the heavy burden of establishing the contrary beyond a reasonabledoubt rests upon the challanger (see Elmwood-Utica Houses, Inc. v Buffalo Sewer Authority, 65 NY2d 489, 495; Maresco v Cuomo, 64 NY2d 242,250). As the following discussion demonstrates, appellant has failed in that burden.

The First Amendment of the United States Constitution

provides, in pertinent part, that "Congress shall make no law respecting an establishment ofreligion , or prohibiting the free exercise thereof * * * (US CONST, 1st Amend.). These provisions commonly known as the Establishment and Free Exercise Clauses, (see Abbington School Dist. v Schemp, 374 US 203, 215-216). The basic purpose of the Religion Clauses is to ensure that government will take no action that either sponsers or favors any particular religion, or interferes with the free exercise of

[5]

religion (see, Walz v Tax Commn., 397 US 664, 669). This doctrine of "benevolent neutrality" permits religious exercise to exist without sponsorship and without interference. The doctrine recognizes, however, that no absolute separation between church and state is really possible, because "the very existence of the Religion Clauses is an involvement of sorts - one that seeks to mark boundaries to avoid excessive entanglement" (id. at 669-670). Thus, it is well established that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause" (id. at 673; see also, Corporation of Presiding Bishop v Amos, 483 US 327, 334).

The United States Supreme Court has indicated that the constitutional validity of laws challenged under the Religion Clauses of the First Amendment is to be evaluated by determining whether the statute has a secular legislative purpose; whether its principal or primary effect is one that neither advances nor inhibits religion; and the statute must not foster excessive government entanglement with religion

(Lemon v Kurtzman, 403 US 602, 612-613).[2]

[6]

Appellant contends that Labor Law § 563(2)(c) fails this test. She argues that the original and only legislative purpose of the statute was to advance religion over non-religion by exempting non-profit religious schools from the responsibility of providing unemployment insurance coverage for teachers employed by them; that the principal or primary effect of the statute is to impermissibly advance religious schools over non-religious schools; and that it unconstitutionally entangles the State in religious matters by requiring that a determination be made whether the employer is a place of worship and whether the claimant employee is performing duties of a religious nature.

Appellant offers little or no analysis to support these assertions. Moreover, her contentions are fatally flawed. She inappropriately purports to examine subdivision (2)(c) of Labor Law § 563 in isolation, notwithstanding that to properly ascertain the intent of the Legislature, and thus the constitutionality of the statute under the Establishment Clause, that sub-division must be viewed in the context of the entire legislative act which embodies it (see, McKinney's Cons Laws of NY, Book 1, Statutes § 97). The legislative history of Labor Law § 563 demonstrates that the purpose of the enactment was to afford the protection of the Unemployment Insurance Law to employees of non-profit organizations which were then exempt from compulsory coverage. To that end, the general exemption of non-

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[2] We note the pendency before the Supreme Court of Lee v Weisman, No. 90-1014 (U.S. argued Nov. 6, 1991 [60 USLW 3351, Nov.12, 1991]), where t was argued that, in the context of prayer in public ceremonies, the Court should re-examine the three-part separation rubric established in Lemon.

[7]

profit religious, charitable, scientific, literary and educational organizations was repealed (see, Memorandum of Industrial Commissioner, Governor's Bill Jacket, L 1965, ch 740). Although exempt from compulsory coverage, these non-profit organizations had the option under the prior law to voluntarily elect coverage. It seems that relatively few of them had availed themselves of this opportunity, however, in consequence of which most of the 350,000 employees of such organizations were unprotected by the prior Unemployment Insurance Law (id.). While the statute repealed the blanket exemption from the Unemployment Insurance Law of non-profit religious, charitable, scientific, literary and educational organizations, the 1965 enactment retained exemptions for various groups the Legislature determined had stable employment, such as religious organizations and medical and teaching staffs and those who, when employed by the non-profit organization, are not active members of the labor force in a true sense, such as clients of sheltered workshops and students working for the educational organizations where they are enrolled (id.; see also, L 1965, ch 740).

Thereafter, in order to insure that New York employers would continue to receive full federal tax credits against their contributions to the unemployment insurance fund, and so that New York would continue to receive federal grants for the administration of the Unemployment Insurance Law, the statute was

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amended to conform to changes in the Federal Unemployment Tax Act, resulting in the elimination of many of the exclusions affecting non-profit organizations (see, Memorandum of Industrial Commissioner, Governor's Bill Jacket, L 1971, ch 1027; Memorandum of Deputy Industrial

ommissioner for Legal Affairs, Governor's Bill Jacket, L 1977, ch 675, § 10).[3] However, the exemptions relating to ministers, lay members of a bona fide church engaged in religious functions and persons employed as caretakers or for the performance of duties of a religious nature, were retained (L 1965, ch 740).

Additionally, the exemption continued to be applicable to other non-religious organizations and types of employment as well. For example, inmates of a custodial or penal institution are exempt, as are persons who participate in certain youth services programs[4] and persons who receive rehabilitative services or are given renumeration to work at a facility conducted to provide work for persons physically or mentally impaired. Contrary to appellant's assertions, the purpose of the

[9]

legislation was not to provide the benefit of the exemption exclusively to religious organizations; rather, the clear secular legislative purpose was to extend unemployment insurance coverage to previously exempt employees of non-profit organizations, while retaining the exemption for the benefit of a range of non-profit organizations whose employees were not active members of the work force in the true sense and whose employment was stable. Thus, religious organizations did not receive the exclusive benefit

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[3]Unemployment insurance benefits in New York are provided through a joint federal-state program pursuant to the Federal Unemployment Insurance Tax Act (FUTA) (26 USC §§ 3301-3311) and the State Unemployment Insurance Law (Labor Law §§ 500-645), with FUTA imposing minimum coverage requirements on the State system.

[4]The exclusion of employees of youth service programs (Labor Law § 563[2][f] was added by a recent amendment, L 1991, ch 413, §62.

of the exemption, but only received an incidental benefit accorded to a range of other organizations. The fact of this incidental benefit does not render the exemption unconstitutional (cf., Texas Monthly, Inc. v Bullock, 489 US 1).

The exemption of section 563(2) is not unlike the real property tax exemption found constitutional by the United States Supreme Court in Walz v Tax Commission (supra). There the Court found that New York City's tax exemption for property used exclusively for religious, educational, or charitable purposes did not advance religion by granting an exemption to all houses of worship as well as to a broad class of property owned by nonprofit organizations. The Court concluded that the statute "simply spare[s] the exercise of religion from the burden of property taxation levied on private profit institutions" (id. at 673). Similarly, section 563(2) spares various non-profit organizations, including religious organizations, the burden of

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contributing to the unemployment insurance fund on behalf of certain designated employees in furtherance of the "time-honored" tradition of exempting non-profit organizations from general taxation (L 1965, ch 740, § 1).

The secular purpose requirement is aimed at preventing the relevant governmental decision maker -- in this case the Legislature -- from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters (Corporation of Presiding Bishop v Amos, 483 U.S. 327, 335). That requirement is satisfied by section 563(2)(c) for the additional reason that it minimizes governmental intrusion into religious affairs by avoiding the necessity of scrutinizing a religious organization's tenets each time a teacher or other employee is discharged for reasons related to the group's religious mission (see, e.g., Corporation of

Presiding Bishop v Amos, 483 US 327, supra). "It is a permissible legislative purpose to alleviate governmental interference with the ability of religious organizations to define and carry out their religious missions" (id.). We therefore find no basis for concluding that the legislative purpose in enacting Labor Law § 563(2)(c) was to advance religious schools over non-religious schools (see, Lemon v Kurtzman, 403 US 602, supra, at 613). We similarly reject appellant's contentions that the "principal or primary effect" of Labor Law § 563(c)(2) is to

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impermissibly advance religious schools over non-religious schools and that its operation results in undue and excessive entanglement of government with religion. The mere fact that religious groups are included within a range of organizations that benefit from the exemption does not have the "principal or primary" effect of "advancing religious schools over non-religious schools" such that it is rendered unconstitutional. Nor does the fact that the exemption "spare[s] the exercise of religion from the burden of [unemployment insurance contributions] levied on [non-religious schools]" render the statute an attempt to "establish" or "advance" religion (see Walz v Tax Commn., 397 US 664, supra, at 673). The Supreme Court has never indicated that statutes that give special consideration to religious groups are per se invalid (see, Corporation of Presiding Bishop v Amos, 483 US 327, 338), or that relieving such institutions of obligations borne by other institutions constitute sponsorship or "establishment" of a particular religion or religion generally (Walz v Tax Commn., supra). "For a law to have forbidden 'effects' under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence" (Corporation of Presiding Bishop v Amos, supra,

at 337). The fact that the exemption provided by Labor Law § 563 may permit religious schools to better advance their purposes by relieving them of the financial burden of

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contributing to the unemployment insurance fund for their employees does not raise the specter of impermissible "sponsorship, financial support, and active involvement of the sovereign in religious activity" (id. at 336-337). Indeed there are many statutes, covering a variety of situations, which place religious institutions in special protective categories with respect to many activities, but are not considered as having "established" or having "the principal or primary effect" of advancing religion, including paying real property taxes (Real Property Tax Law § 420 a, subd 1, para [a]), zoning (see, e.g., Matter of Diocese of Rochester v Planning Board of Town of Brighton, 1 NY2d 500), and the use of alcohol in the community (Alcoholic Beverage Control Law, § 64, subd 7) (see, Rochester Christian Church v NY Public Service Commn. 55 NY2d 196, 202).

Finally, although amendments to Labor Law § 563(2) have eliminated many of the non-religious employers that were originally exempted from compulsory contributions to the unemployment insurance fund (see, L 1971, ch 1027; L 1975, ch 675), the statute still provides the exemption to non-religious as well as religious organizations. Therefore, it cannot be said that it is aimed exclusively or specifically at religious groups or organizations (cf., Texas Monthly v Bullock, 489 US 1, supra), or that it impermissibly benefits religious organizations more

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than non-religious organizations (see, Walz v Tax Commn., 397 US 664, 672-673, supra)!

We agree with the Appellate Division that the statute's primary effect is the efficient administration of the Labor

Law, attained in part by maintaining a "benevolent neutrality" toward all religion; in other words, the statute minimizes the involvement of government with the free exercise of religion. Although one effect of the statute is to allow religious organizations an economic benefit as a result of the exemption, such benefit is incidental, and does not deprive the exemption, as a whole, of its secular purpose and effect (see, Texas Monthly v Bullock, supra at 14-15). Indeed, "[w]here, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, [there is] no reason to require that the exemption come packaged with benefits to secular entities" (Corporation of Presiding Bishop v Amos, supra, at 338). Moreover, since the government does not transfer part of its revenue to religious organizations, but simply abstains from demanding that religious organizations make payments on behalf of certain employees performing religious duties (see, Walz v Tax Commn., 397 US 664, 675, supra), the effect of the exemption is to "restrict[] the fiscal relationship between church and state, and * * * to complement and reinforce the desired separation insulating each from the other" (id. at 676).

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We find no unconstitutional entanglement by the State in religious matters required by the provisions of section 563(2)(c). In analyzing a State's involvement in religion "[t]he test is inescapably one of degree," and "the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement" (Walz v Tax Commn., supra, at 675). For the purposes of section 563(2)(c), however, the inquiry required to determine the religious status of an employer and thus the applicability of section 563(2)(c) is minimal; legitimate

good-faith characterizations of religious status by an organization must be accepted by the civil courts unless found to be insincere or a sham (see, Matter of Holy Spirit Assn. for Unification of World Christianity v Tax Commn. of City of NY, 55 NY2d 512, 527-528; Matter of Hollis Hills Jewish Center [Roberts], 92 AD2d 1039, 1040, supra). Thus, rather than fostering excessive government entanglement with religion, the exemption under examlnation here necessarily gives rise to a lesser degree of intrusion than would be required were the exemption not granted. Without the exemption there would be "official and continuing surveillance" required by collection activities and the attendant enforcement of the collection and compensation provisions of the statute (see, Labor Law §§ 570- 575; see also, Walz v Tax Commn., supra at 674-675). We conclude

[15]

that any entanglement between church and state is minimized by the exemption found in section 563(2)(c), thereby effectuating a more complete separation between the two (see, Corporation of Presidinq Bishop v Amos, 483 US 327, 339, supra; Walz v Tax Commn., supra at 674-675).

Appellant's equal protection claim likewise must fail because the statutory classification at issue is reasonably related to legitimate state interests. There is no fundamental right to unemployment insurance benefits and the statute does not involve a suspect classification; therefore, to withstand an equal protection challenge the exclusion need only bear a rational relation to a legitimate government interest (see, Ohio Bureau of Employment Services v Hodory, 431 US 471, 589; People v Whidden, 51 NY2d 557, 460, appeal dismissed 454 US 803). The statutory classification involved here is based upon the religious nature of appellant's employment, excluding from mandatory unemployment insurance coverage persons "employed at a place of reliqious

worship * * * for the performanc+ of duties of a religious nature * * * " (Labor Law § 563[2¦[c]). As noted above, the original purpose of the exclusions of Labor Law § 563(2) was to extend unemployment insurance coverage to employees of certain non profit organizations while retaining the exemption for some organzations, including religious organizations, in accordance with the "time-honored" tradition of sparing certain

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tax-exempt, non-profit organizations from the burden of general taxation. In addition, the exemption promotes the efficient administration of the unemployment insurance program by avoiding undue government involvement in problems peculiar to religious employment. Section 563(2)(c) is rationally related to these legitimate purposes and, therefore, does not offend the Equal Protection Clause.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

* * * * * * * * * * * * * * * * * * * *

Order affirmed, with costs. Opinion by Judge Alexander. Chief Judge Wachtler and Judges Simons, Kaye, Titone, Hancock and Bellacosa concur.

Decided December 23, 1991

APPENDIX C
Opinion of Appellate Division, Third Department

October 18, 1990 60390

SUPREME COURT - APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT.

In the Matter of the Claim
of SHIRLEY KLEIN,

Appellant, OPINION

THOMAS F. HARTNETT, as
Commissioner of Labor,

Respondent.

Argued, September 11, 1990.
Before: HON. A. FRANKLIN MAHONEY,
Presiding Justice,
HON. T. PAUL KANE,
HON. JOHN T. CASEY,
HON. HOWARD A. LEVINE,
HON. NORMAN L. HARVEY,
Associate Justices.

APPEAL from a decision of the Unemployment Insurance Appeal Board, filed March 16, 1989, which ruled that claimant was ineligible to receive unemployment insurance benefits and charged her with a recoverable overpayment of benefits.

GILBERT OFFENHARTZ, 884 West End Avenue, New York, New York 10025, for appellant.

ROBERT ABRAMS, Attorney-General (Steven Segall and Jane Lauer Barker of counsel), 120 Broadway, New York, New York 10271, for respondent.

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KANE, J.

Claimant was employed as an English teacher by Congregation Bais Yaakov, a religious organization which operates Beth Jacob High School in Brooklyn. After her employment there ended, claimant filed for and initially received unemployment insurance benefits. It was subsequently determined, however, that claimant was ineligible for benefits because she had been employed by a religious organization that was exempt under the Labor Law from making unemployment benefit contributions. Charged with $4,140 in recoverable benefits, claimant requested and was given a hearing at which she argued, inter alia, that the employer exemption violated the Establishment Clause of the US Constitution. An Administrative Law Judge sustained the initial determination and the Unemployment Insurance Appeal Board affirmed, avoiding the constitutional issue and finding that claimant was employed "at a place of religious worship for the performance of duties of a religious nature" which excluded her from receiving benefits pursuant to Labor Law § 563 (2) (c). This appeal followed.

Labor Law § 563 (2) excludes a variety of "employment" from unemployment insurance coverage, including "services rendered for a non-profit organization by * * * a person employed at a place of religious worship as a caretaker or for the performance of duties of a religious nature" (Labor Law § 563 [2] [c]). Claimant concedes that her position as a teacher at the Beth Jacob High School constituted such noncovered employment pursuant to the statute (see, Matter of Hollis Hills Jewish Center [Roberts], 92 AD2d 1039), but instead contends that the law itself unconstitutionally favors religious establishments over nonreligious establishments.

The United States Supreme Court has articulated a three-part test traditionally applied to laws challenged under

the Establishment Clause of the 1st Amendment (see, Lemon v Kurtzman, 403 US 602, 612-6I3). The statute in question (1) must have a secular legislative purpose, (2) must neither advance nor inhibit religion, and (3) must not result in an excessive government entanglement with religion. (see, id.; see also Edwards v Aguilard, 482 US 578,583; Matter of Dickens v Ernesto, 30 NY2d 61, 67, appeal dismissed 407 US 917). Claimant initially asserts that Labor Law § 563 (2) (c) cannot be said to promote a clearly secular legislative purpose but instead can only be interpreted as advancing religious establishments. We disagree. In our view, the purpose of enacting Labor Law § 563 as a whole was to provide certain nonprofit organizations with an exemption from unemployment insurance contributions. Other nonreligious employment is also encompassed within the legislation, (see Labor Law § 563 [d], [e]), and it is well established that government policies with secular objectives may incidentally benefit religion (see, Texas Monthly v Bullock, 489 US 1). Indeed, "[t]he limits of permissible state accommodation to religion are by no mean co-extensive with the noninterference mandated by the Free Exercise Clause" (Walz v Tax Comn. of City of N.Y. 397 US 664, 673). We find that a reading of the statute at issue here "affords no basis

[3]

for a conclusion that the legislative intent was to advance religion" (Lemon v Kurtzman, 403 US 602, 613, supra). We similarly find that the actual primary effect of the statute does not unconstitutionally advance religious establishments. Although one effect of the statute permits religious organizations an exemption from paying contributions for unemployment benefits, any religious benefit is, again, incidental (see, Texas Monthly v Bullock, supra). Instead, the statute's primary effect is, in our view, the efficient

administration of the Labor Law, attained in part by maintaining the concept of the State's "benevolent neutrality" toward all religion (see, Walz v Tax Comn of City of N.Y. supra, at 675-677.)

Finally, we discern no "excessive entanglement" between the statute and religious establishments. We reject claimant's argument that the State must unconstitutionally involve itself in determining an employer's religious status to implement the statute and properly allow the exemption. Legitimate good-faith characterizations of status by the religious establishment itself are sufficient (see, Matter of Holy Spirit Assn. for Unification of World Christianity v Tax Comn. of City of N.Y. 55 NY2d 512, 518-519,; Matter of Hollis Hills Jewish Center [Roberts], 92 AD2d 1039,1040, supra). Furthermore, without the exemption religious establishments would be exposed to increased state intervention through the collection of contributions and the attendant enforcement (see, Labor Law § 501 et sec.; Note, Redemption Through Exeeption: Unemployment Insurance and Sectarian Schools, 55 NYU L Rev 242, 269 [1980]). Therefore, the statute actually effectuates a greater separation between the state and religion. (see, Walz v Tax Comn. of City of N.Y.; supra, at 674-675; see also, Roemer n Board of Public Works of Maryland, 426 US 736, 748 n 15).

Accordingly, we find that Labor Law § 563 (2) does not violate the Establishment Clause of the US Constitution. For the same reasons, we summarily reject claimant's purely conclusory equal protection argument as meritless. The decision of the Board should therefore be affirmed.

Opinion by KANE, J., in which MAHONEY, P.J., CASEY, LEVINE and HARVEY, JJ., concur.

Decision affirmed, without costs.

APPENDIX D
Opinion of Unemployment Insurance Appeals Board

(Letterhead of)
NEW YORK STATE DEPT OF LABOR
Unemployment Insurance Appeal Board

SHIRLEY KLEIN
CONGREGATION BAAIS YAAKOV
AHI EZER YESHIVA
(addresses omitted)
Appeal No. 390,966
A.L.J. No. 087-27482
S.S.A. No. 090-30-8399
Local Insurance Office No. 534

DECISION OF THE BOARD
PRESENT: ARTHUR A. STRAUSS, G. DOUGLAS PUGH
Members.

The claimant appeals from the decision of the administrative law judge filed December 8, 1988 sustaining the initial determination of the local office holding her ineligible to receive benefits effective March 30, 1987 because she did not have at least 20 weeks of covered employment in her base period and charging her with an overpayment of $4,140 in benefits, ruled to be recoverable.

Hearings were held before the administrative law judge at which all parties were accorded a full opportunity to be heard and at which claimant, her attorney and witnesses for the employer and representatives of the Commissioner of Labor appeared and testimony was taken. The Board considered the arguments contained in the brief submitted on behalf of claimant on appeal.

Based on the record and testimony in this case the board makes the following

FINDINGS OF FACT: Claimant filed an original claim for benefits effective March 30, 1987, thereby establshing a base year from March

[2]

31, 1986 through March 29, 1987. During her base year she worked as a teacher for a religious organization for 13 weeks. In September, 1986, she commenced working as a high schoool English teacher at another school operated by a religious organization. The school was solely for orthodox Jewish girls and all of the teachers were required to be Jewish women. The students engaged in religious studies during each morning and took secular courses inthe afternoon. The students attended both morning and afternoon prayer services. The employer suggested that teachers attend such services, but claimant did not do so. All books, including those used in the secular courses, were screaned and checked by administrators to see that there was no offense to the Jewish faith contained in them. The work of the teachers, including the claimant, was observed by administrators of the school to insure that the girls were taught along traditional Jewish lines. Claimant's employment concluded at the end of March, 1987. She thereafter received payments through June 1987. She received $4,140 in benefits before her claim was redetermined.

OPINION: Section 563.2 (c) [sic] states that the term "employment" does not include services performed for a non-profit organization by a person employed at a place of religious worship for the performence of duties of a religious nature. In the present case the credible evidence establishes that the building where the school was located was a place

where religious worship occurred, as evidenced by the fact that all the students were required to attend both morning and afternoon prayer services. In Matter of Hollis Hills Jewish Center, 92 AD2d 1039, the Court held that where the evidence indicated that the school in question was operated in accordance with the mandated of the Jewish religion and emphasized the beliefs and principles of that faith, this characterization by the employer that its operation that its operation of the school was related to religious objectives, made in good faith, must be accepted by civil courrts. In the present case, the credible evidence clearly shows that the employer's school was operated pursuant to and emphasized the beliefs and principles of the Jewish faith and accordingly, we conclude that claimant's work there must be excluded from [sic] as employment, as defined by section 563.2(c) [sic] of the Labor Law. She therefore did not have sufficient weeks of covered employment to file a valid original claim. The benefits she received constitute an overpayment.

DECISION: The initial determinations of the local office are sustained.

The decision of the administrative law judge is affirmed.

ARTHUR A. STRAUSS, MEMBER
G. DOUGLAS PUGH, MEMBER

APPENDIX E
Opinion of Administrative Law Judge

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE ADMINISTRATIVE LAW JUDGE SECTION

Decision and Notice of Decision

In the Matter of
SHIRLEY KLEIN

Decision mailed and duly filed in the Department of Labor on December 8, 1988

Request Date: December 21, 1987

OTHER PARTIES: (addresses omitted)
Congregation Bais Yaakov
Ali Ezer Yeshiva
New York State Dept. of Labor Local Insurance Office #534

PARTIES PRESENT: CLT. EMP/WIT COMM/LA BOR

PURPOSE OF HEARING:
To determine CLAIMANT'S
Coverage of employment in base period.
Overpayment of benefits.

FINDINGS OF FACT: Hearings were held at which claimant, claimant's counsel, representatives of the Commissioner and an employer and counsel for the employer appeared and testimony was taken.

Claimant filed an original claim effective March 30, 1987

thereby establishing a base period from March 27, 1986 through March 29, 1987. Claimant was ruled not to have filed a valid original claim as she had insufficient weeks of covered employment during her base period. She was ruled overpaid $4,140.00 which was ruled to be recoverable. Claimant was employed as a teacher of English in a religious institution in its elementary school program during the 1985 to 1986 school year to June 30, 1986. After being paid on a twelve months basis through August 1986, claimant accepted employment as an English teacher in a girls's high school operated by another religious institution commencing September, 1986 after which she applied for benefits at the end of March, 1987. Claimant was observed in her work by the authorities of the institutin in both instances with an eye toward training girls along traditional Jewish religious principles, to enculcate a feeling of orthodoxy, claimant was informed. Although state supplied curricula were used, in the high school the text were examined and edited for religious purposes and secular faculty were asked to attend religious services.

[2]

OPINION: As claimant was a teacher during her base and pre-base period in religious institutions although teaching a secular subject I find that she was under Matter of Hollis Hills, not entitled to benefits under the Unemployment Insurance Law. Claimant was, therefore, overpaid benefits in the amount of $4,140.00 which is recoverable.

DECISION: The initial determinations are sustained. Claimant was overpaid $4,140.00 which is recoverable.

/s/ MARGARET GIOVANNIELLO
Administrative Law Judge

No. 91-1479

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

In the Matter of the Claim of SHIRLEY KLEIN,

Petitioner,

against

THOMAS F. HARTNETT, as Commissioner of Labor,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of New York

BRIEF IN OPPOSITION

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Commissioner of Labor
State Capitol
Albany, New York 12224
(518) 473-0330

JERRY BOONE
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General
Counsel of Record

JANE LAUER BARKER
Assistant Attorney General
In Charge of Labor Bureau

MARYELLEN WEINBERG
Assistant Attorney General

STEVEN SEGALL
Associate Attorney
Of Counsel

QUESTION PRESENTED

Does New York State's exemption of non-profit organizations from compulsory unemployment insurance coverage for employees who perform duties of a religious nature at places of religious worship violate either the Establishment Clause of the First Amendment or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

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In the Matter of the Claim of
SHIRLEY KLEIN,

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Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

Respondent, Commissioner of Labor of the State of New York ("Commissioner")[1] submits this brief in opposition to the petition for a writ of certiorari. The petition should be denied because it does not raise an important question of federal law which has not been settled by this Court and does not present a conflict with the applicable decisions of this Court.

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[1] After this proceeding was brought, Thomas F. Hartnett resigned as Commissioner of Labor. The current Commissioner is John F. Hudacs.

STATEMENT OF THE CASE

1. Statutory Background

N.Y. Labor Law §563(2) was enacted in 1965 to extend unemployment insurance coverage to non-profit organization employees generally. It repealed the general exemption of non-profit religious, charitable, scientific, literary and educational organizations, but retained exemptions for the following groups:

a) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, by a member of a religious order in the exercise of duties required by such order;

b) a lay member elected or appointed to an office within the discipline of a bona fide church and engaged in religious functions;

c) a person employed at a place of religious worship as a caretaker or for the performance of duties of a religious nature, or both, unless voluntary election has been made pursuant to the provisions of section five hundred sixty one of this article;

d) a person who

1) receives rehabilitative services in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or

2) is given remunerative work in a facility conducted for the purpose of providing such work for persons who cannot be readily absorbed in the competitive labor market because of their impaired physical or mental capacity.

e) an inmate of a custodial or penal institution;

f) a person who participates in a youth service program designed to foster a commitment to community service and occupational and educational development and who, while participating in that program, performs services in the community or attends school and receives a stipend designed to cover expenses incurred in performing services or attending school, and is eligible for an award or scholarship upon leaving the program.[2]

According to the legislative history of this enactment, its purpose was to expand generally the coverage of the State unemployment insurance law, while the exclusions were intended to exempt non-profit organizations with stable employment, those workers who, when employed by non-profit organizations, are not active members of the labor force, and to address the concerns of church and other non-profit groups who claimed that coverage would violate the historical principle of excluding them from taxation. *Memorandum of Industrial Commissioner, Governor's Bill Jacket 1965 N.Y. Laws, Ch. 740.* Thus, §563(2) excludes from unemployment insurance coverage not only persons employed to perform religious functions and duties, but also rehabilitation clients and handicapped workers

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[2] The exclusion of youth service programs, §563(2)(f), was added by a recent amendment, 1991 N.Y. Laws, Ch. 413, §62.

in sheltered workshops, prison inmates, and participants in youth service programs.

2. Facts

Petitioner Shirley Klein taught English literature at a religious high school for girls, known as Beth Jacob High School. The school terminated her employment before the end of the 1987 school year. She filed for and initially received unemployment insurance benefits. However, upon the employer's objection, the Commissioner determined that this employment was excluded from coverage under N.Y. Labor Law §563(2)(c) and that petitioner did not have sufficient weeks of covered employment to file a valid original claim for benefits. N.Y. Labor Law §§527, 563(2)(c). Klein requested and was given a hearing before an administrative law judge ("ALJ") at which she argued that the employer exemption in N.Y. Labor Law §563(2)(c) violated the Establishment and Equal Protection Clauses of the United States Constitution.

The ALJ sustained the Commissioner's determination and the ALJ's decision was affirmed by the New York State Unemployment Insurance Appeal Board. The ALJ and the Appeal Board determined that Klein was ineligible for unemployment insurance benefits because her position as a teacher at the Beth Jacob High School was excluded from coverage under the terms of N.Y. Labor Law §563(2)(c).

The New York Supreme Court, Appellate Division, Third Department, affirmed the Board's decision and held that §563(2)(c) does not violate the Establishment Clause of the First Amendment. The court also rejected Klein's equal protection argument as meritless. *Matter of Klein v. Hartnett*, 164 A.D.2d 9 (3d Dept. 1990) (Pet. App. C).

Upon petitioner's appeal, the New York State Court of Appeals affirmed the decision of the Appellate Division. *Matter of Klein v. Hartnett,* 78 N.Y.2d 662 (1991)(Pet. App. B). The Court of Appeals upheld the state law as consistent with this Court's decisions under the Establishment Clause. Specifically, the court held that the state law's exclusion from unemployment insurance coverage for religious workers met the three-part test articulated in *Lemon v. Kurtzman,* 403 U.S. 602 (1971). The Court held that New York Labor Law §563(2)(c) has a secular legislative purpose, as part of a larger act to extend compulsory unemployment insurance coverage to most employees of nonprofit organizations, while retaining exemptions for a range of non-profit organizations having stable employment or providing work for certain persons not in the competitive labor market, 78 N.Y.2d at 667-668, that "the statute's primary effect is the efficient administration of the Labor Law," 78 N.Y.2d at 671, and that any benefit to religion is incidental, since religious organizations do not receive the exclusive benefit of the exemption, 78 N.Y.2d at 668. The Court of Appeals further found that rather than fostering excessive entanglement with religion, "any entanglement between church and State is minimized by the exemption found in section 563(2)(c)," 78 N.Y.2d at 672, since it avoids any need for the State to scrutinize a religious organization's tenets each time an employee performing religious duties is discharged for reasons related to an employer's religious mission. 78 N.Y.2d at 669.

The Court further held that the classification in N.Y. Labor Law §563(2)(c) does not violate equal protection because it is rationally related to the broader legislative purpose of extending unemployment insurance coverage to most employees of nonprofit organizations while maintaining "time-honored" exemptions, as well as the purpose of promoting the efficient administration of the unemployment insurance program. 78 N.Y.2d at 672.

REASONS FOR DENYING THE WRIT

POINT I

THE EXCLUSION FROM COVERAGE OF PERSONS EMPLOYED AT A PLACE OF RELIGIOUS WORSHIP FOR THE PERFORMANCE OF DUTIES OF A RELIGIOUS NATURE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The New York Court of Appeals correctly held that the unemployment insurance coverage exclusion for persons employed at a place of religious worship for the performance of duties of a religious nature, N.Y. Labor Law §563(2)(c), does not violate the Establishment Clause. The exclusion satisfies the test established by this Court for laws challenged under the Establishment Clause because it has a secular legislative purpose, does not have the primary effect of advancing religion over non-religion, and does not foster an excessive entanglement with religion.[3] *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

N.Y. Labor Law §563(2)(c) has a secular legislative purpose, as part of a larger act to extend compulsory unemployment insurance coverage to most employees of nonprofit organizations, while retaining exemptions for certain types of organizations having stable employment or providing work for certain persons not in the competitive labor market. These goals are unrelated to religion. That the statute incidentally

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[3] The possible alternative Establishment Clause tests which this Court reportedly recently considered upon oral argument in *Lee v. Weisman, No. 90-1014, 60 USLW 3351* (argued November 6, 1991), governmental endorsement of religion or coercion of religious belief, do not appear to be applicable to this case. Petitioner's Establishment Clause argument does not concern a coercion, but a limited exemption of nonprofit religious organizations, as employers, from unemployment insurance contributions.

benefits religion does not invalidate it. In *Walz v. Tax Commn. of the City of New York*, 397 U.S. 664 (1970), for example, the property tax exemption at issue also benefitted religious organizations by freeing them from property tax obligations, but the legislative purpose passed constitutional muster because the exemption was not "aimed at establishing, sponsoring, or supporting religion." 397 U.S. at 674. As explained in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989):

> [T]his Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur.

489 U.S. at 10 (citation omitted).[4]

Moreover, as this Court stated in *Corporation of Presiding Bishop*, 483 U.S. at 335, *Lemon's* purpose requirement "does not mean that the law's purpose must be unrelated to religion"; rather, the aim of *Lemon* is to prevent the government "from abandoning neutrality and acting with the intent of promoting a particular point in religious matters." *Id.* As in *Corporation of Presiding Bishop*, "it is a permissible legislative purpose to alleviate governmental interference with the ability of religious organizations to define and carry out their religious missions." 483 U.S. at 335. Were the coverage exclusion of §563(2)(c) struck down, each time an employee performing religious duties is discharged for reasons related to the group's religious mission, the religious organization would face scrutiny of its

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[4] This case is distinguishable from *Texas Monthly, Inc. v. Bullock*, *supra*, where the Texas sales tax exemption was directed solely at religious publications. Because of that, the Court held that Texas had provided unjustifiable assistance to religious organizations.

religious tenets. The prospect of such scrutiny could well affect the ability of the group to carry out its mission.

The New York Court of Appeals also properly held that *Lemon's* second requirement was met, since "the statute's primary effect is the efficient administration of the Labor Law, attained in part by maintaining a 'benevolent neutrality' toward all religion; in other words, the statute minimizes the involvement of government with the free exercise of religion." *Matter of Klein v. Hartnett*, 78 N.Y.2d at 671. The economic benefit of an exemption from unemployment insurance contributions is incidental to that primary effect. This case, therefore, falls squarely under the *Walz* and *Corporation of Presiding Bishop* cases, holding that similar exemptions did not have the primary effect of advancing religion.

By contrast, in *Texas Monthly v. Bullock*, upon which petitioner relies, the primary effect of the Texas sales tax exemption for religious periodicals was to provide an economic benefit to religion. It was not claimed to promote the efficient administration of the Texas sales tax, since application of a sales tax to individual sales does not require a case-by-case analysis, as application of the N.Y. Labor Law to individual unemployment insurance claims does. Moreover, this Court has found "ample room for accommodation of religion under the Establishment Clause." *Corporation of Presiding Bishop v. Amos*, 483 U.S. at 338. Since the law has a proper purpose, there is "no reason to require that the exemption come packaged with benefits to secular entities." *Id.*

Finally, as the New York Court of Appeals found, "rather than fostering excessive government entanglement with religion, the exemption under examination here necessarily gives rise to a lesser degree of intrusion than would be required were the exemption not granted." *Matter of Klein v. Hartnett*, 78 N.Y.2d at 671-672. Petitioner claims, without explanation, that

the exclusion from unemployment insurance coverage of persons performing duties of a religious nature for a religious organization fosters a greater degree of entanglement between government and religion than extending coverage to them would involve. To the contrary, the statutory exclusion enables New York to avoid intrusive inquiries into the religious activities of religious organizations. If the statutory exclusion were invalidated, respondent Commissioner would be required to inquire into how each such claimant's employment ended (N.Y. Labor Law §593), which in this context might well involve disputes concerning religious doctrine or practice arising from work related conduct such as discussing the theory of evolution, in violation of the employer's rules, or violations of other religious prohibitions. Resolution of such disputes would result in the Commissioner's undue entanglement with religion and possible interference with the free exercise of religion, whether he grants or denies benefits. See Note, *Redemption through Exemption: Unemployment Insurance and Sectarian Schools*, 55 N.Y.U.L. Rev. 242, 257-262 (1980).

Therefore, petitioner has not demonstrated that the Court of Appeals' decision conflicts with the decisions of this Court, or that there is any other important reason for this Court to grant the petition.

POINT II

THE COVERAGE EXCLUSION AT ISSUE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner claims that N.Y. Labor Law §563(2)(c), by excluding her work for a religious school from unemployment insurance coverage while covering teachers in other non-profit schools, is a violation of her right to equal protection. This

argument fails because the statutory classification at issue is reasonably related to legitimate state interests and, thus, comports with equal protection guarantees.

Petitioner concedes that there is no fundamental right to unemployment insurance (Petition p. 17), and the classification at issue does not affect any protected class. The statutory classification involved here is based not upon petitioner's religion, or her sex, as the petition (at p. 17) implies, but upon the religious nature of her employment, excluding from mandatory coverage persons "employed at a place of religious worship as a caretaker or for the performance of duties of a religious nature..." Labor Law §563(2)(c).

In *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), this Court rejected the argument that laws drawing distinctions on religious grounds should be strictly scrutinized: "[L]aws affording a uniform benefit to *all* religions" should be analyzed under *Lemon v. Kurtzman*. 483 U.S. at 339. As the Court stated:

> In cases such as these, where a statute is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion, we see no justification for applying strict scrutiny to a statute that passes the *Lemon* test. 483 U.S. at 339.

Under *Lemon*, the proper inquiry is whether the government "has chosen a rational classification to further a legitimate end." *Id.*

The purpose of the coverage exclusion in N.Y. Labor Law §563(2)(c) was to provide certain non-profit organizations which have stable employment or workers who are not truly in the labor market with an exemption from unemployment insurance contributions and, in addition, to avoid interference with the

free exercise of religion and promote efficient administration of the unemployment insurance program by avoiding involvement in problems peculiar to religious employment. Section 563(2)(c) is rationally related to these legitimate purposes and, therefore, does not offend the equal protection clause.

CONCLUSION

For the foregoing reasons, respondent respectfully urges that the Court deny the petition for a writ of certiorari.

Dated: Albany, New York
April 21, 1992

Respectfully submitted

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Commissioner of Labor
State Capitol
Albany, N.Y. 12224
(518) 473-0330

JERRY BOONE
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General
Counsel of Record

JANE LAUER BARKER
Assistant Attorney General
In Charge of Labor Bureau

MARYELLEN WEINBERG
Assistant Attorney General

STEVEN SEGALL
Associate Attorney
Of Counsel